Supreme Court, U.S.
FILED

No. 97 -- (1)

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In The

Supreme Court of the United States

October Term, 1997

ROBERT LONG and SHARON LONG, individually and as parents and next friends of minor Daniel Long, DANIEL LONG, JOHNNY MENDOZA, SR. and MIRIAM MENDOZA individually and as parents and next friends of minor Johnny Mendoza, Jr., and JOHNNY MENDOZA, Jr.

Petitioners,

vs.

SCHOOL BOARD OF,
ALACHUA COUNTY, FLORIDA, and
K-III Communications
Corporation

Respondents.

Petition for a Writ of Certiorari
to the District Court of Appeal of Florida, First District

PETITION FOR A WRIT OF CERTIORARI

JOSEPH W. LITTLE
Counsel of Record *
Professor of Law
University of Florida
College of Law
Gainesville, Florida 32611
(352) 392-2219
Attorney for Petitioners

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QUESTION PRESENTED FOR REVIEW

Does the State deprive minor school children and their parents of constitutionally protected liberty interests without due process of law in violation of the Fourteenth Amendment to the United States Constitution to require the children against their consent and that of their parents to be a daily audience of television commercials especially targeted to children as a condition of attending public schools operated by the State when the purpose of the State in requiring the audience is to obtain the free use of television equipment for the schools and the use of a daily public affairs television program in which the commercials are seamlessly integrated and which are not otherwise a part of the required curriculum or a graduation requirement of any student?

LIST OF ALL PARTIES TO THE PROCEEDING

Robert Long and Sharon Long, individually and as parents and next friends of minor Daniel Long, Daniel Long, Johnny Mendoza, Sr. and Miriam Mendoza individually and as parents and next friends of minor Johnny Mendoza, Jr., and Johnny Mendoza, Jr.

Former plaintiffs, Darnell Rhea, Ralph Hess, John Griner, Kathryn Griner and Joshua Griner.

Respondents School Board of Alachua County, Florida and K-III Communications Corporation. The predecessor to K-III was Whittle Communications, L.P.

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TABLE OF CITATIONS

Cases Cited:

Dawson v. East Side Union High School,
28 Cal. App. 4th Dist. 998, 34 Cal.
Rptr. 2d 108 (Cal. 6th Dist. 1994) 11, 15, 17

Meyer v. Nebraska (1923) 262 U.S. 390, 402,
43 S.Ct. 625, 628 67 L.Ed. 1042 13

*M.L.B. v. S.L.J.*_____U.S.___(1996), 117 S.Ct.
555, 136 L.Ed. 2d 473 13

Parham v. J.R. (1979) U.S. 584, 600, 99 S.Ct.
2493, 2503, 61 L.Ed.2d 101 12

Pierce v. Society of Sisters (1925) 268 U.S.
510, 534, 45 S.Ct. 571, 69 L.Ed. 1070 13

State v. Whittle Communication,
420 S.E. 2d 556 (N.C. 1991) 11, 14

Wallace v. Knox County Board of Education,
Case No. 92-6195 (unpublished) United States
Court of Appeals for the Sixth Circuit (1993)
. . . . . 11, 14

Wisconsin v. Yoder, 406 U.S. 205, 92 S.Ct.
1526, 32 L.Ed.2d 15 12

United States Constitution Cited:

Fourteenth Amendment 5x

Publications

FOX, ROY F., HARVESTING MINDS: HOW TV COMMERCIALS CONTROL KIDS 12

ORDER BELOW

The Order to be reviewed is:

Decision of District Court of Appeal, First District of Florida (Appendix A), affirming without opinion decision of circuit court of the Eighth Judicial Circuit of Florida (Appendix B).

STATEMENT OF JURISDICTION

(i) Date of Entry of Judgment to be Reviewed:

Dec. 17, 1997

(ii) Reliance on Rule 12.3:

None

(iii) Statutory Provision Believed to Confer Jurisdiction on the Court:

28 U.S.C. § 1257

(iv) Constitutional and Statutory Provisions

Involved:

Fourteenth Amendment, United States Constitution:

"No State Shall. . . deprive any person of . . . liberty. . . without due process of law."

STATEMENT OF CASE

Facts Material to the Questions Presented

K-III Communications Corporation, a successor to Whittle Communications, L.P., (hereinafter referred to as K-III), produces a daily ten minute public affairs program into which it seamlessly integrates two minutes of commercial television advertisements targeted to school children and featuring products such as candy and athletic shoes. This integrated public affairs commercial program is known as Channel One. K-III markets Channel One to public schools throughout the United States as a package which mandates the daily Channel One program, related products and the installation of television equipment in

schools for use in class rooms to show Channel One and as the schools otherwise choose. In exchange, the contracting schools involved in this case agreed to provide all the children in the school in a home room or a regularly scheduled class to be a daily audience for Channel One, including the commercial advertisements. If a school fails to perform, K-III removes the equipment from the school.

The School Board of Alachua County, Florida (hereinafter referred to as STATE) entered into a district contract with K-III (or its predecessor), and several of STATE's schools in Alachua County, Florida entered into school agreements with K-III. Petitioners are former students of these schools and their parents. At the time this action commenced the children were minors and were compelled against their consent or that of their parents to be in K-II's daily Channel One audience as a condition of attending STATE's free public schools. STATE did not

have any alternative educational program for children who objected to being a compelled audience of the daily Channel One commercial advertisements as a condition of attending STATE's schools, (or whose parents objected), and did not inform the minor children or their parents that children did not have to remain in the daily Channel One audiences if they or their parents objected. STATE did not include any aspect of the daily Channel One program within any course in its curriculum and did not include the content as a graduation requirement for any student.

The parents of petitioner Daniel Long objected to the compelled presence of their son in K-III's daily Channel One audience, and on an *ad hoc* basis Daniel's principal permitted Daniel to sit in the principal's office when the daily Channel One program was shown. STATE provided no alternative educational program for Daniel while he was in the principal's office. This isolation so

embarrassed and humiliated Daniel before his classmates that his parents subordinated their objections to STATE's compulsion of their son to be in the daily Channel One audience to their son's emotional well being, and permitted Daniel to return to the daily Channel One audience in his last years of high school.

Petitioners who were minor children when this litigation commenced have now graduated and STATE discontinued its Channel One contracts in Alachua County, Florida in 1996.

Petitioners brought an action under 42 U.S.C. §1983 for declaratory and injunctive relief and damages, claiming that STATE's practices deprived them of protected liberties without due process of law. On December 11, 1996, the circuit court of the eighth judicial circuit of Florida granted STATE's and K-III's motions for summary judgment, holding that STATE possessed the power to impose the Channel One contract upon

Petitioners without violating rights guaranteed by the United States Constitution. (Exhibit 2).

Petitioners appealed to the District Court of Appeal, First District of Florida, seeking reversal on the specific grounds that STATE's practice violated Petitioner's Fourteenth Amendment rights. On December 17, 1997, that Court affirmed the circuit court's decision without issuing a written opinion. (Exhibit 1). Under Article V, Florida Constitution, such a judgment is not reviewable by the Florida Supreme Court and constitutes a "decree rendered by the highest court of a State in which a decision could be had" within the meaning of 28 U.S.C. § 1257(a).

REASONS FOR GRANTING THE WRIT

QUESTION PRESENTED

Does the State deprive minor school children and their parents of constitutionally protected liberty interests without due process of law in violation of the Fourteenth

Amendment to the United States Constitution to require the children against their consent and that of their parents to be a daily audience of television commercials especially targeted to children as a condition of attending public schools operated by the State when the purpose of the State in requiring the attendance is to obtain the free use of television equipment for the schools and the use of a daily public affairs television program in which the commercials are seamlessly integrated and which are not otherwise a part of the required curriculum or a graduation requirement of any student?

FIRST REASON TO ALLOW THE WRIT

This court may take judicial notice of the fact that K-III's Channel One program has been marketed to schools throughout the United States and has been the source of appellate litigation in at least four of them, including this case from Florida. The other three are California, *Dawson v. East Side Union High School*, 28 Cal.

App. 4th Dist. 998, 34 Cal. Rptr. 2d 108 (Cal. 6th Dist. 1994); North Carolina, *State v. Whittle Communication*, 420 S.E. 2d 556 (N.C. 1991), and Tennessee, *Wallace v. Knox County Board of Education*, Case No. 92-6195 (unpublished) United States Court of Appeals for the Sixth Circuit (1993). Channel One has also been subjected to extensive academic criticism including, FOX, ROY F., HARVESTING MINDS: HOW TV COMMERCIALS CONTROL KIDS, at 156-157 (1996).

Petitioners readily concede that STATE possesses wide discretion in prescribing curriculums and standards of dress and decorum in state supported public schools. Nevertheless the Constitution imposes limits upon this discretion, and Petitioners respectfully submit that the practice challenged in this action goes beyond the limits. In particular, these practices violated the liberties of children and parents in childrearing, family and schooling decisions protected by the Fourteenth Amendment within

the ambit of liberties acknowledged in prior decisions of this Court, including: *Parham v. J.R.* (1979) U.S. 584, 600, 99 S.Ct. 2493, 2503, 61 L.Ed.2d 101; *Wisconsin v. Yoder*, 406 U.S. 205, 92 S.Ct. 1526, 32 L.Ed.2d 15; *Meyer v. Nebraska* (1923) 262 U.S. 390, 402, 43 S.Ct. 625, 628 67 L.Ed. 1042; *Pierce v. Society of Sisters* (1925) 268 U.S. 510, 534, 45 S.Ct. 571, 69 L.Ed. 1070, and *M.L.B. v. S.L.J.*_____U.S.___(1996), 117 S.Ct. 555, 136 L.Ed. 2d 473.

Petitioners respectfully submit that STATE's claim to the power to expose the minds of children to commercial advertisements as a means of raising money for the State raises a spectre of propagandizing children that is reminiscent of some of the most odious state driven propaganda of the century. In the pleadings in this case Petitioners also objected to political propaganda in the content of the Channel One public affairs programming, but this petition is solely directed to state compelled exposure to economic propaganda in the form

of commercial advertisements targeted directly to the minds of children.

Petitioners submit the need of this Court to review this STATE practice of compelling minor school children to be exposed to economic propaganda as a means of financing STATE's programs as the first reason to grant the writ.

SECOND REASON TO ALLOW THE WRIT

The second reason to grant the writ is to resolve the conflict that exists among the states as to whether the STATE economic propaganda practices challenged herein violate the Fourteenth Amendment. Of the four cases stated above, the unpublished decision of the United States Court of Appeals of the Sixth Circuit (*Wallace, supra.*) addressed only the issue of whether the Channel One practices violated Wallace's rights of religious freedom guaranteed by the First Amendment. The *Wallace* court rejected the religious freedom claim and

these petitioners have never made such a claim.

In *State v. Whittle Communications* 402 S.E. 2d 556 (N.C. 1991), an agency of state government of North Carolina challenged the Channel One practice as being beyond the authority of the agency implementing it under the North Carolina law. The North Carolina court rejected that claim but made no ruling on Fourteenth Amendment issues. (A strong dissenting opinion impugned Channel One as "neither instructional nor needed for educational purposes." 402 S.E. 2d @ 568). These petitioners have made no such a claim.

The third decision, *Dawson v. East Side Union High School*, 28 Cal. App. 4th 998, 34 Cal. Rptr. 2d 108 (Cal. 6th Dist. 1994), did involve an individual's Fourteenth Amendment challenge to the Channel One economic propaganda practices on the grounds Petitioners have asserted herein. Although *Dawson* found that the practice as actually implemented by the school in question

did not violate the Fourteenth Amendment, *Dawson*, nevertheless, directly conflicted with the decision below on the key constitutional point Petitioners seek to have reviewed by this Court. *Dawson*, contrary to the decision below, flatly held that under the Fourteenth Amendment, "public school students cannot be compelled to watch classroom video advertising." (Emphasis supplied). 34 Cal. Rptr 2d at 129. Contrary to STATE's practices in this case, the school board in *Dawson* had taken these affirmative steps to avoid unconstitutional state compulsion:

> 1. K-III's (i.e., Whittle's) school agreement with the school board explicitly permitted schools to allow students to "opt out" of the daily Channel One audience.
>
> 2. K-III (i.e, Whittle) and the East Side Union School District had in fact agreed that "the District would not require

students to watch Channel One but would instead make this an optional student activity."

3. Prior to commencing the program, the school board informed parents of the opt out option both by letter and at a "Back-to-School" meeting.

4. The school board provided opting out students an optional educational opportunity in a designated study area during the daily Channel One showing.

5. Students who did not opt out entirely could study or otherwise ignore Channel One while shown or attend school meetings.

Id. at 131. In this action, the facts are different in every important detail. K-III's agreement with STATE did not permit STATE to allow children to opt out, but required

STATE to produce all the children for the daily Channel One audience. STATE did not inform children and parents of any right to opt out. STATE did not provide an optional educational program in a designated study area or otherwise. STATE and K-III did not consider Channel One to be an optional student activity.

Petitioners respectfully submit that Dawson and this decision from Florida constitute conflict between courts of highly populous states on a constitutional matter of extreme importance to the personal liberties of millions of minor children and their parents and that this conflict is urgently deserving of resolution by this Court.

CONCLUSION

Because of the extreme gravity of the practice of STATE compelled exposure of the minds of minor school children to commercial economic propaganda as a means of raising funds for the STATE and of the need to resolve conflict, Petitioners respectfully pray this Court to issue

the writ.

Respectfully submitted,

Joseph W. Little
Attorney for Petitioners
Professor of Law
University of Florida
Gainesville FL 32611
352-392-2211

APPENDIX A

Opinion of the Court Below

COURT OF APPEAL OF FLORIDA, FIRST DISTRICT

CASE NO. 97-745

RALPH HESS, DARNELL RHEA, ROBERT LONG and SHARON LONG, as parents and next friends of minor Daniel Long, DANIEL LONG, JOHNNY MENDOZA, SR. and MIRIAM MENDOZA, as parents and next friends of minor Johnny Mendoza, Jr., and JOHNNY MENDOZA, JR.,

Plaintiffs/Appellants,

v.

SCHOOL BOARD OF ALACHUA COUNTY, FLORIDA,

Defendant/Appellee, and

K-III COMMUNICATIONS CORPORATION,

Intervenor/Appellee.

December 17, 1997, Opinion Filed

PRIOR HISTORY: An appeal from the Circuit Court for Alachua County. Frederick D. Smith, Judge.

COUNSEL: Joseph W. Little, Gainesville, for Appellants.

Thomas L. Wittmer, Staff Counsel, Gainesville, for Appellee School Board of Alachua County.
John Radey and Elizabeth McArthur of Katz, Kutter, Haigler, Alderman, Bryant & Yon, P.A., Tallahassee, for Appellee K-III Communications Corporation.

OPINION:

PER CURIAM. AFFIRMED.

BOOTH, and VAN NORTWICK, JJ., and COSTELLO, ASSOCIATE JUDGE, CONCUR.

APPENDIX B

Order of Circuit Court Eighth Judicial Circuit of Florida

IN THE CIRCUIT COURT OF THE EIGHTH JUDICIAL CIRCUIT IN AND FOR ALACHUA COUNTY, FLORIDA

ROBERT LONG and SHARON LONG, et al.,

Plaintiffs,

vs. Case No.: 92-3214

SCHOOL BOARD OF ALACHUA COUNTY,

Defendant,

and

K-III COMMUNICATION CORPORATION,

Intervenor.

_____/

ORDER GRANTING MOTION OF SUMMARY JUDGMENT FOR BOARD AND K-III AND DENYING PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT

This action was heard on the Board's and K-III's

motion for summary judgment on October 28, 1996. After hearing argument of counsel and reviewing the affidavits in support of both motions the court finds that there is no material issue of fact and that summary judgment is proper.

Channel One programming has been challenged in North Carolina, Tennessee and California. In each case the plaintiffs raised issues of due process, privacy, liberty and free public schools and in each case the court found those arguments without merit. *Wallace v. Knox County Bd. of Ed.*, No. CIV 3-92-219, Order and Memorandum Opinion (E.D. Tenn., 8/6/92), *Dawson v, East Side Union High School District*, 34 Cal. Rptr. 2d 108, 121 (Cal. 6th Dist. 1994) and *State v. Whittle Communication*, 402 S.E. 2d 556 (N.C. 1991). Though these cases are not binding on the court, the analyses are thorough and the rationale convincing. A parent's rights to choose a child's path of

education does not encompass a fundamental constitutional right to dictate the curriculum at a public school. *Brown v. Hot, Sexy and Safer Productions*, Inc., 68 F.3d 525 (1st Cir. 1995), *cert denied*, 116 S.Ct. 1044 (1996). The court finds that there was no violation of fundamental constitutional right and that the court must apply a rational basis standard to the Board's actions. Though this court may not have reached the same decision on Channel One programming as the Board, the court recognizes that the school board is made up of elected officials who are given the authority to make these decisions. *See, Ferrara v. Hendry County School Board*, 362 So.2d 371 (Fla. 2d DCA 1978), *rev. denied*, 368 So.2d 1366 (Fla. 1979), *cert denied*, 444 S.S. 856, 100 S.Ct. 116, 62 L.Ed. 2nd 75 (1979). The court therefore finds that current events literacy is a valid educational objective and that the methods for achieving that objective are also

within the purview of the school board's discretion and do not violate any constitutional provision. The methods by which the Board reached this decision were not arbitrary and therefore will not be overturned by this Court.

It is therefore

ADJUDGED that the Motion for Summary Judgment for the Board for K-III is granted and the Motion for Partial Summary for Plaintiff is denied.

ORDERED on December 11, 1996.

Original Signed by
Frederick D. Smith
Circuit Judge